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Issue Date: 31 March 2004

CONSOLIDATED CASE NO.: 2003-ERA-00018

In the Matter of

DAVID A. HANNUM,
Complainant,

v.

DETROIT EDISON COMPANY,
Respondent,

CASE NO.: 2003-ERA-00025

In the Matter of:

DAVID A. HANNUM,
Complainant,

v.

FLUOR HANFORD, INC. and MASTER-LEE HANFORD,
Respondents.

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT MASTER-LEE AND FLUOR HANFORD'S MOTIONS FOR SUMMARY DECISION AND DISMISSING COMPLAINT

This consolidated matter arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 *et seq.* ("ERA" or the "Act"), and the regulations promulgated thereunder at 29 C.F.R. Part 24. This statutory provision and implementing regulations protects employees from discrimination in retaliation for engaging in protected activities such as reporting safety violations. Complainant David A. Hannum ("Complainant") proceeds *pro se* and alleges that Respondents Master-Lee Hanford ("Master-Lee") and Fluor Hanford, Incorporated ("Fluor Hanford" or "Fluor") retaliated against him for voicing safety concerns relating to nuclear operator training procedures at Fluor Hanford. Both Master-Lee and Fluor Hanford have moved for summary decision, denying any retaliation against Complainant. After reviewing the parties' submitted evidence and arguments, I communicated to them in a telephone conference on March 19, 2004 my tentative decision to grant both motions effectively vacating the hearing date previously set for March 22, 2004.

Procedural History

On June 12, 2003, Complainant filed a complaint with the Department of Labor alleging that he had been terminated and blacklisted from employment by Respondents Master-Lee and Fluor Hanford for raising nuclear safety concerns. On August 13, 2003, the Occupational Safety and Health Administration ("OSHA") issued a Notice of Determination to Complainant dismissing his complaint against Respondents on grounds of untimely filing. By Order of October 10, 2003, Complainant's claim of retaliatory termination against Master-Lee was dismissed as untimely, but Complainant's claim of retaliatory blacklisting was permitted to proceed. By Amended Complaint, Complainant alleged that Master-Lee and Fluor Hanford engaged in retaliatory blacklisting by issuing and maintaining a "stop access" order against him.

Master-Lee filed its first summary decision motion on November 17, 2003, but by Procedural Order issued December 15, 2003, I took such motion under advisement until discovery reached completion. On March 2, 2004, Master-Lee timely filed a renewed motion for summary decision and accompanying brief, with attached exhibits A through E, consisting of selected excerpts from the Depositions of Mr. Charles MacLeod, taken February 13, 2004; Mr. Rick Largent, taken February 10, 2004; Mr. Nick Liewer, taken February 10, 2004; Complainant David Hannum, taken February 20, 2004; and Mr. John Robinson, also taken February 20, 2004. On March 2, 2004, Respondent Fluor Hanford timely filed a summary decision motion, with attached excerpted deposition transcripts of Mr. Robert Heck, Mr. Fritz Strankman, Ms. Shannon Strankman, Ms. Claudette Lang, and Ms. Jackie Slonecker, each taken February 11, 2004; Mr. David Van Leuven, Mr. Robert Day-Phalen, Mr. Charles MacLeod, and Mr. Kenneth Norris, each taken February 13, 2004; and Mr. John Robinson and Complainant.

Complainant filed a timely response, and submitted in support of his response the following: a "position statement" letter on behalf of Fluor Hanford to the Human Rights Commission, dated April 28, 2003; a letter from Complainant to Fluor Hanford dated March 26, 2002; a facsimile dated June 12, 2002 from Fluor consisting of information related to Complainant; and selected excerpts from the depositions of Ms. Shannon Strankman, Ms. Jackie Slonecker, Mr. Rick Largent, Mr. Nick Liewer, Mr. Charles MacLeod, and finally, Mr. John Robinson. Complainant also timely filed a Pre-Hearing Statement on March 9, 2004 with attached proposed exhibits 1 through 133 (hereinafter referred to as "CX"). Having fully considered the allegations, arguments and submissions of the parties, I find and conclude that the motions for summary decision should be granted for the reasons stated below.

Issues for Determination

Whether a genuine issue of material facts exists with regard to whether Complainant has established a *prima facie* case that either or both Respondent Master-Lee and Respondent Fluor Hanford discriminated against him in violation of the ERA, and whether Complainant's complaint was timely filed.

Discussion

Pursuant to 29 C.F.R. § 18.40(d), an administrative law judge may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. In determining whether summary decision is appropriate, the administrative law judge must consider all the materials submitted by the parties in the light most favorable to the non-moving party and must draw all inferences in favor of the non-moving party. FED. R. CIV. P. 56(c); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970); *Han v. Sargent,* 523 F.2d 461, 464 (1st Cir. 1975) (quoting *Poller v. Columbia Broad. Sys.,*368 U.S. 464, 473 (1962)). The moving party bears the initial burden of showing that there is no genuine issue of material fact and once discharged, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). The non-moving party may not rest upon the mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1985). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact, and the movant is entitled to summary decision. *Celotex Corp.,* 477 U.S. at 322-23.

To establish a *prima facie* case of retaliatory or discriminatory action under the ERA, a complainant must show that (1) the complainant engaged in protected activity; (2) the respondent employer was aware of complainant's engagement in protected activity; (3) the respondent employer subjected complainant to an adverse employment action with respect to his compensation, terms, conditions, or privileges of employment; (4) the respondent is within the term "employer" as defined by § 5851(a)(2) of the ERA; and (5) a nexus exists between the protected activity and the adverse employment action. *Bauer v. U.S. Enrichment Corp.,* 2001-ERA-9 (ARB May 30, 2003); *Williams v. Lockheed Martin Corp.,* 1998-ERA-40, 1998-ERA-42 (ARB Sept. 29, 2000).

Findings of Fact and Conclusions of Law

Complainant began work with Respondent Master-Lee, a subcontractor to Respondent Fluor Hanford, Inc. in March of 2001. Complainant was hired to work at a Department of Energy ("DOE") clean-up site, the Spent Nuclear Fuel Project, as a Senior Task Analyst conducting operation and training classes for the employees of Respondent Fluor Hanford, Inc. Complainant has alleged that between March and April 2001, he made the following recommendations and criticisms to Fluor management: that the nuclear operator task analysis for the Fuel Retrieval System (FRS) was "severely deficient" and failed to comply with DOE regulations; that Fluor management did not follow DOE regulations and Fluor Training Procedures related to the development of operator training and related to the qualification of contract instructors; that a nuclear incident involving fissionable materials had occurred because of improper handling procedures and severely deficient nuclear operator training materials; and finally, that the removal of an armed security guard from a fissionable materials storage area was

improper. *Complainant's Pre-Hearing Statement* at 1-8. Complainant further alleged that Fluor employees harassed him during the course of his employment.

On July 12, 2001, Respondent Master-Lee terminated Complainant at the request of Fluor Hanford, allegedly due to Complainant's "performance deficiencies." Following his termination, Complainant submitted a letter to the Washington State Attorney General office, who suggested that Complainant contact the Human Rights Commission and Office of the Insurance Commissioner. CX 92. On July 25, 2001, Complainant contacted the DOE, Office of Special Concerns ("SCO") regarding his "retaliation for not following a direction" given by a Fluor Hanford manager. CX 93. According to the SCO Disposition Form, Complainant reported that in July 2001 he had forgotten his security badge and was "bullied" for it, in that the supervisor required him to buy donuts per some unwritten practice at Hanford; that his training class in July 2001 was wrongly perceived as "a disaster" when computer failure was to blame; and that part of Complainant's "layoff was due to Robert Day-Phalen finding out" about his purchase of a house during the later part of his employment. CX 94. Because the SCO was unable to address these issues, it referred the matter to Fluor Hanford's Employee Concerns Program ("ECP"), who investigated and concluded that "retaliation and intimidation was not substantiated." CX 94. Complainant had repeated to the ECP his allegations initially communicated to the DOE SCO, for instance, that he was "strong-armed" by the Fluor manager for forgetting his badge. *Id.* According to the ECP report, Complainant was informed that because Complainant felt that his firing was in retaliation for "not bringing donuts" as directed, this did not fall under the ambit of legally protected activities such as taking action to prevent harm to the environment. *Id. at 7.*

Following Complainant's termination from Master-Lee, Complainant "conducted my own investigation" of the reason for his termination, consisting of "calling up people and asking them if they knew why my [Complainant's] work ended." A few days following Complainant's termination, Complainant allegedly visited Fluor's corporate offices unannounced in order to contact a Fluor corporate officer. On July 20, 2001, Complainant met with Mr. Nick Liewer, Personnel Manager at Master-Lee Hanford, who inquired of Complainant as to whether he had attempted to contact a Fluor officer. Apparently, Mr. Liewer had learned of the event from Mr. Rick Largent, Operations Manager at Master-Lee, who in turn had learned of it through Mr. John Robinson of Fluor Hanford. As part of his investigation, in September 2001, Complainant also contacted Ms. Claudette Lang, the secretary to Mr. Robert Day-Phalen, Fluor's acting Training Manager. Apparently there is a dispute as to what occurred during the telephone conversation between Ms. Lang and Complainant; Ms. Lang testified in deposition that Complainant had asked for Mr. Day-Phalen's home address, that during the conversation she had become "scared" and following its termination had called the Day-Phalen residence, to ensure or at least warn of their physical safety. Mr. Day-Phalen in his deposition testimony stated that, while at a bowling alley, he had received a phone call from Ms. Lang and as a result he immediately went home. Mr. Day-Phalen further testified that in October 2001, a representative from the Benton County Sheriff's Department met with training department employees for awareness training regarding concerns about Complainant.

In October or November 2001, Complainant continued his erratic behavior of showing up unannounced to continue his personal investigation. He spoke with Mr. Bob Heck, Fluor's Vice President/Project Director of the Spent Fuel Project. Mr. Heck testified via deposition that

Complainant had called him late at night to discuss his termination from Master-Lee. In November 2001, Complainant visited the residence of Mr. Fritz Strankman, and spoke with a woman there, apparently the wife of Mr. Strankman. Mrs. Strankman in her deposition testimony recalled a conversation between herself and Complainant; Complainant, however, apparently doubted that the woman, Mrs. Stankman, whom he had asked to be deposed was the woman he had spoken to in November.

On December 3, 2001, Respondent Fluor Hanford, through their in-house counsel, Mr. Charles MacLeod, placed a "Stop Access" or "Denial of Site Access" on Complainant, effectively denying Complainant access to Fluor Hanford sites and making him ineligible for hire there. Complainant was unaware of this status until being informed of it by Mr. MacLeod on February 14, 2002. Complainant filed a second concern with the DOE SCO requesting to know why his site access had been denied and iterated his initial statements made in 2001 to the SCO. The concern, being "an employee employer issue," was referred to Fluor Hanford's ECP on February 22, 2002, which was in turn referred to Fluor Hanford's legal department. CX 98. On March 26, 2002, Complainant submitted a four-page, single-spaced letter to Mr. Van Leuven of Fluor Hanford, iterating the events surrounding his termination and requesting information regarding his "stop access" status. CX 99. Mr. Van Leuven referred the letter to Fluor's legal department.

On March 28, 2002, Complainant filed a charge of discrimination against Master-Lee Hanford with the EEOC and Washington State Human Rights Commission. CX 123. Complainant alleged that during his employment he was "the target of unwanted sexual attention"; and that he was subjected to a hostile work environment because he "failed to follow a manager's demand that I buy donuts." He further alleged that he had been discharged because of his religion, age, the potential high costs of health care associated with his daughter, and finally, because of his "complaints about decreased security measures and about poor management procedural practices." *Id.* Complainant's charge was later dismissed, and the EEOC issued him a Right To Sue letter. *Complainant's Deposition* at 59-60. Complainant did not subsequently sue because "there were other circumstances that came into play" and "it just never did happen." *Id.* at 60.

Complainant filed a Freedom of Information Act ("FOIA") request to the DOE on February 20, 2002, requesting his security files and personal files that contained "any derogatory information." Due to the operation of a contract between Fluor Hanford and the DOE, the information Complainant sought was not considered a government record and therefore could not be supplied. On April 2, 2002, Complainant wrote a letter to the Director of the DOE, asking for the Director's support in resolving the matter of Fluor Hanford's "burying" of information. CX 102. On April 4, 2002, the DOE, Office of Hearings and Appeals, interpreted Complainant's letter as a FOIA appeal and assigned it a case number, which was ultimately denied on May 2, 2002. CX 104.

On April 11, 2002, Complainant visited the corporate offices of Fluor Federal Services and Respondent Fluor alleges that due to his behavior, Complainant had to be escorted by security off the premises. A Patrol Log described the event as, "Hannum wanted to talk to

VanLueven about possibly getting his job back. The Richland unit arrived and then left without incident, because Hannum had not committed a crime." CX 112.

On April 22, 2002, Complainant submitted another letter to the DOE, repeating his objective of gaining access to the "derogatory information that has been used against me in my pursuit to gain employment," and stating, on the basis of representation from Mr. Norris in a telephone conversation the same day, that "the DOE has this information and is not revealing it me." CX 103. Complainant later submitted a letter dated May 29, 2002, to Congressman Doc Hastings, asking for his assistance in resolving his "ongoing problem." CX 105.

On June 14, 2002, the DOE Manager responded to Complainant's April 22, 2002 letter and interpreted it as a "concern" regarding Complainant's access status, which was then investigated by the DOE/SCO. The DOE/SCO concluded that Complainant was "terminated for legitimate business reasons" and as a result of "post termination activities and behaviors exhibited with FHI representatives, on December 3, 2001, FHI [Fluor Hanford] initiated the process for a 'Denial of Site Access.'" CX 106.

Complainant submitted a letter to Mr. Norris in October 2002, which was referred to Mr. MacLeod who, on November 4, 2002, denied Complainant's allegations that Fluor Hanford had "misled" the DOE and United States Congress. CX 99.

On May 1, 2002, Complainant appeared at a job fair held at a local college. Respondent Fluor alleges that Complainant "bothered" representatives of a subcontractor of Fluor to the point that police assistance was requested. Complainant denies any such conduct, but admits to being present at the job fair.

On June 18, 2002, Complainant and Mr. MacLeod saw each other at a convenience store. Complainant inquired as to his lack of security status, and Mr. MacLeod responded that because of his behavior Complainant would continue to be on the stop access list.

On June 26, 2002, Complainant visited the FFS offices. Complainant submitted a letter to Mr. Liewer on June 25, 2002, requesting information regarding the "accusation" about having "attempted to force my way past the Fluor secretary in an attempt to enter the office of the President." CX 115. On June 27 and June 29, 2002, Complainant wrote a letter to Mr. Largent and Mr. Charveneua of Fluor Federal Services requesting information about the same accusation. CX 116.

Complainant filed a duplicative complaint with the Washington State Human Rights Commission and the EEOC on March 14, 2003, against Fluor Hanford. CX 122. Complainant alleged that the stop access maintained by Fluor Hanford adversely affected his ability to obtain employment, and that Fluor initiated the stop access in retaliation for complaining about discrimination. *Id.* On April 28, 2003, Fluor Hanford, through Mr. MacLeod, responded to the EEOC investigation with a position statement asserting that the stop access was placed on Complainant due directly to "numerous instances involving Mr. Hannum in which employees of FH and its subcontractors felt threatened by Mr. Hannum's actions." CX 129. Apparently the

Washington state commission issued a "no cause" determination to Complainant's March 2003 complaint. *Id.*

Respondent Master-Lee's Motion for Summary Decision

Respondent Master-Lee argues it is entitled to summary decision because Complainant will be unable to meet his burden to establish a *prima facie* case. Specifically, Respondent Master-Lee asserts that it neither issued nor maintained the stop access order, the basis of the alleged blacklisting claim, nor did it provide Fluor with any information that led to the issuance of such order. As such, Master-Lee argues, summary decision is proper because Complainant has failed to establish a genuine issue of material fact with regard to whether Master-Lee subjected Complainant to an adverse employment action.

Complainant alleges, *inter alia,* that Master-Lee retaliated against him by "conspiring" with Fluor Hanford in order to assist Fluor Hanford to place a stop access on him, and also by "cooperating with Fluor Hanford in communicating false accusations to conceal the true facts related to the placement of a Stop Access." *Complainant's Response* at 3; *Complainant's Pre-Hearing Statement* at 8-9. A party opposing a summary judgment motion must produce "specific facts showing there remains a genuine factual issue for trial and evidence significantly probative as to any [material] fact claimed to be disputed." *Collings v. Longview Fibre Co.,* 63 F.3d 828, 834 (9th Cir. 1995) (quoting *Stenkl v. Motorola, Inc.,* 703 F.2d 393, 393 (9th Cir. 1983)). Purely conclusory allegations with no concrete, relevant particulars will not bar summary judgment. *Forsberg v. Pacific Northwest Bell Tel. Co.* 840 F.2d 1409, 1419 (9th Cir. 1988). When a non-moving response "consists of nothing more than mere conclusory allegations then the court must enter judgment in the moving party's favor." *Peppers v. Coats,* 887 F.2d 1493, 1498 (11th Cir. 1989).

The undisputed facts demonstrate that Respondent was responsible solely for Complainant's termination, and not for the issuance and maintenance of the stop access order. The stop access order, forming the basis of Complainant's blacklisting claim, was issued and maintained by Fluor Hanford, a fact testified to by Mr. Charles MacLeod, counsel for Fluor, corroborated by Mr. Rick Largent and Nick Liewer, employees of Master-Lee, and admitted by Complainant himself.

Furthermore, there is no factual evidence indicating that Master-Lee ever communicated information to Fluor relating to Complainant's termination that would serve as a basis for the issuance of a stop access order. The only facts in this regard concern a telephone conversation in July 2001 whereas Fluor employee John Robinson called Rick Largent at Master-Lee to advise Mr. Largent that Fluor was sending a letter to Master-Lee regarding Complainant. Mr. Largent then called Mr. Liewer of Master-Lee and informed him that he had received a phone call from Mr. Robinson of Fluor, who had raised concern over an apparent incident involving Fluor Vice President Mr.Van Leuven.

Of the 22 allegations related to retaliation by Master-Lee, over 8 concern this apparent incident involving the Complainant's alleged behavior towards Mr. Van Leuven in July 2001.[1] Complainant vehemently denies that any such event occurred and asserts that this "false allegation" was used to place the stop access on Complainant. Even assuming without deciding the veracity of this allegation, I note that *Fluor* via Mr. Robinson first contacted *Master-Lee* via Mr. Largent regarding the incident, and not vice-versa. There is no indication or supporting evidence that Master-Lee "fabricated" the "false allegation" and communicated it to Fluor, who alone bears the authority of issuing stop access orders. Further, there are no other allegations that would serve to tie Master-Lee to the claim of alleged blacklisting on the part of Fluor Hanford.

Viewed in the light most favorable to Complainant, the submissions of the parties lack any evidence, much less a cognizable dispute, concerning whether Fluor Hanford significantly relied on any representation or information--- false or not---offered by Master-Lee in issuing the stop access order. The Complainant fails to establish an adverse action, much less an employment action, on the part of Master-Lee as related to his blacklisting claim.

Accordingly, as to his blacklisting claim, Complainant has failed to raise a genuine issue of material fact as to whether Respondent Master-Lee subjected Complainant to an adverse employment action. The undisputed facts indicate that Master-Lee was not responsible, explicitly or implicitly, for the issuance and maintenance of the stop access order. As a result, because there are no genuine issues of material fact, Complainant has failed to set forth a claim upon which relief may be granted, and therefore summary decision in favor of Respondent Master-Lee is proper.

Respondent Fluor-Hanford's Motion for Summary Decision

Respondent Fluor-Hanford argues that summary decision should be granted in its favor on several bases. Fluor first argues that Complainant's blacklisting claim should be dismissed because it fails to meet the specificity requirements of 29 C.F.R. § 24.3(c), that the alleged blacklisting should be considered a "discrete act," and as such avoid the procedural protection of the continuing violations doctrine, and further argues that Complainant has failed to cite a specific instance of blacklisting during the limitations period. Fluor also argues that Complainant has failed to establish any element of his *prima facie case*, and as there are no genuine issues of material fact, summary decision in its favor is proper.

Timeliness of Complainant's Complaint

Any complaint under the ERA shall be filed within 180 days after the occurrence of the alleged violation. 42 U.S.C. § 5851(b)(1); 29 C.F.R. § 24.3(b)(2). The time limit is in the nature of a statute of limitations and is not jurisdictional. *See Sch. Dist. of City of Allentown v. Marshall,* 657 F.2d 16 (3d Cir. 1981). Statutes of limitation run from the date an employee receives final, definitive, and unequivocal notice of an adverse employment decision. *English v.*

[1] Complainant has raised this issue repeatedly since at least April 2002 in prior filings with the DOE and in numerous letters to Fluor-Hanford executives and to his Congressman. *See* Findings of Fact and Conclusions of Law, *infra*.

Whitfield, 858 F.2d 957, 961-62 (4th Cir. 1988). Stated differently, statutes of limitation in environmental whistleblower cases begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights. *Ross v. Florida Power & Light Co*., 96-ERA-36, slip op. at 4 (ARB Mar. 31, 1999); *McGough v. U.S. Navy*, Nos. 86-ERA-18/19/20, slip op. at 9-10 (Sec'y June 30, 1988).

The 180-day limitation period begins to toll "when the discriminatory decision has been both made and communicated to the complainant." 29 C.F.R § 1979.103(d) (2003); *See Trechak v. American Airlines, Inc.,* 2003- AIR-5 (ALJ Aug. 8, 2003)(for AIR 21 cases, 90-day statute of limitations). By limiting the period in which a complaint may be filed in employment discrimination claims, Congress "intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). The Supreme Court has admonished courts that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id*. at 826. Therefore, instances of discrimination falling outside the statutory period are no longer actionable, barring an applicable exception. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061 (2002).

The continuing violations doctrine, if applicable, permits a complainant to include discriminatory actions that fall outside the limitations period. *Burzynski v. Cohen*, 264 F.3d 611 (6th Cir. 2001). In *Morgan,* the United States Supreme Court limited the application of the continuing violations doctrine and applied the continuing violations doctrine to a racial discrimination complaint brought under Title VII. The plaintiff in that case alleged three types of discrimination: discrete, retaliatory, and hostile work environment. *Id*. at 2069. The Court determined discrete and retaliatory discrimination to be similar in that each occurs on a specific date. *Id*. at 2071. In contrast, hostile work environment discrimination by its "very nature involves repeated conduct" and can take place over a series of days or years. *Id.* at 2073.

In addition, the Court explained that the separate instances comprising the hostile work environment claim may not be actionable individually. *Id*. Regarding application of the continuing violations doctrine, the Court held that

> [d]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.

Id. at 2072. Mere subsequent effects of earlier discriminatory action will not extend the limitations period. *Kassaye v. Bryant College*, 999 F.2d 603, 606 (1st Cir. 1993).

The Court determined that the continuing violations doctrine could not apply to include discrete or retaliatory acts of discrimination that occurred outside the Title VII statutory limitations period.[2] *Morgan*, 122 S.Ct. at 2077. In contrast, the Court concluded that a hostile work environment claim would not be time barred "so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Id.* The Sixth Circuit recently addressed *Morgan* in *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003). *Sharpe* involved an employment discrimination claim brought under 42 U.S.C. § 1983, the Civil Rights Act of 1871. *Id.* at 260. The court found that the holding in *Morgan* should not be restricted only to Title VII claims and applied the holding to the § 1983 claim. *Id.* at 267.

Morgan has been applied in other cases. In *Ford v. Northwest Airlines, Inc*., 2002-AIR-21 (ALJ Oct. 18, 2002), the *Morgan* rationale was applied to bar alleged discriminatory acts falling outside the limitations period, and there the complainant had not presented evidence of a hostile work environment; therefore, the continuing violations doctrine did not apply. *Id*. at 7. In *Trechak v. Amer. Airlines, Inc.,* 2003-AIR-5 at 7 (ALJ Aug. 8, 2003), I likewise applied the holding in *Morgan* to find the complainant's action to be time-barred.

Complainant argues that the continuing violations doctrine should be applied to his claim so that acts occurring outside the 180-day limitations period may be included. Complainant contends that the adverse employment actions formed a pattern of discrimination beginning in April 2001 and continuing through February 2003 as he could not find work in the nuclear industry. Respondent argues that the adverse employment actions occurring prior to December 12, 2002 are discrete acts outside the 180-day limitation period and that there is no later discrete act that brings into play the continuing violation doctrine. I agree.

Complainant filed his complaint on June 12, 2003. Therefore, alleged discriminatory actions occurring between December 12, 2002 and June 12, 2003 are within the 180-day limitations period and are actionable. Actions falling outside of that time period are barred, unless an exception is applicable. Complainant has not alleged and provided admissible evidence to show any discriminatory actions took place during the 180-day limitations period preceding his June 12, 2003 complaint filing. First, he claims that he was terminated in July 12, 2001 from his work by Respondent Master-Lee Hanford. Later, in December 2001, Respondent Fluor Hanford placed Complainant on the "Stop Access" or "Denial of Site Access" list and refused to re-hire Complainant based on his erratic post-termination investigation conduct after he was terminated. Complainant learned of his placement on these lists in February 2002 when

[2] The earlier cases cited by Complainant of *Garn v. Benchmark Technologies, 88-ERA-21 (Sec'y Sept. 25, 1990)* and *Egenreider v. Metro Edison Co*, 85-ERA-23 (Sec'y Apr. 20, 1987). are distinguishable and no help to Complainant here. In Garn, the ARB found that complainant's discovery on February 18, 1988 that he had been placed on a no access list allowed his February 22, 1988 complaint filing to be timely despite the fact that the actual placement of complainant's name on the no access list occurred outside of the applicable statute of limitations. Here, Complainant discovered his placement on Fluor's no access list no later than April 2002 when he referenced so in a letter to the DOE. The 180 days began to run on April 22, 2002 when Complainant discovered the effect of his name being on Fluor's no access list. Similarly, *Egenreider* is also distinguishable because in that case the ARB remanded to allow a full evidentiary hearing on the employer's actions taken against the complainant within the applicable statute of limitations. Here, there are no such actions alleged against Fluor after December 12, 2002 as, by then, Fluor had already placed Complainant's name on the no access list for his post-termination erratic behavior.

he spoke with Respondent Fluor Hanford's in-house counsel, Charles MacLeod. All of these actions are outside the limitations period. A claim based on these instances is no longer actionable as they occurred outside the statute of limitations. In addition, Complainant has failed to present evidence of any discrete adverse act within the 180-day limitation period or evidence of a hostile work environment or a discriminatory policy by Respondent Fluor Hanford Consequently, the continuing violations doctrine does not apply.

Because Complainant has neither alleged nor provided admissible evidence to show any discriminatory actions took place during the 180-day limitations period, I find that his complaint is untimely and recommend its dismissal.

Even assuming *arguendo* that Complainant timely filed his complaint against Respondents, Complainant has failed to establish a *prima facie* case of retaliatory action by Fluor Hanford, and as such Respondent's motion for summary decision is proper. Complainant cannot establish that Fluor knew of his alleged whistleblower status or that the decision to place him on the stop access list was made based on such status. Complainant, therefore, cannot prevail in this action and his complaint should be dismissed.

Prima Facie Case

Protected Activity

As aforementioned, to establish a *prima facie* case of retaliatory or discriminatory action by respondent, a complainant must, in addition to other statutory requirements, show that he engaged in protected activity, that he was subject to adverse employment action, that his employer was aware of the protected activity, and that a causal link exists between the protected activity and the adverse employment action. *Bechtel Constr. Co. v. Sec'y of Labor,* 50 F.3d 926, 933-34 (11th Cir. 1995); *Williams v. Lockheed Martin Corp.,* 1998-ERA-40, 1998-ERA-42, at 4 (ARB Sept. 29, 2000). "Protected activity" encompasses external and internal complaints regarding safety and environmental concerns. *See Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) (affirming the Administrative Review Board's finding that an internal complaint under the ERA constituted protected activity); *Bassett v. Niagara Mohawk Power Co.,* 1986-ERA-2 (Sec'y Sept. 28, 1993); *Dysert v. Westinghouse Electric Corp.,* 1986-ERA-39 (Sec'y Oct. 30, 1991). A complaint need not be formal, as an informal, verbal complaint to a supervisor may constitute protected activity. *See Hermanson v. Morrison Knudsen Corp.*, 1994-CER-2, at 5 (ARB June 28, 1996) (citing *Nichols v. Bechtel Constr., Inc.*, 87-ERA-44, slip op. at 10 (Sec'y Oct. 26, 1992)). Lastly, protection is afforded to employees who make safety and health complaints grounded in conditions that constitute reasonably perceived violations of the environmental laws, but not when an employee has a mere subjective belief that the environment might be affected. *Kesterson v. Y-12 Nuclear Weapons Plant,* 1995-CAA-12, at 3 (ARB Apr. 8, 1997).

Respondent Fluor-Hanford argues that Complainant has failed to allege that he engaged in a protected activity. Complainant in his Response and Pre-Hearing Statement has alleged that he complained, criticized, and/or recommended to Fluor management that training and handling procedures for the fuel retrieval system were severely deficient and in violation of the Atomic

Energy Act and the U.S. Department of Energy regulations. *Complainant's Pre-Hearing Statement* at 2-3; *Complainant's Response* at 2-3. Complainant also alleges, however, that his conduct in connection to his investigation into the reason for his termination from Master-Lee led to his placement on the stop access list. Respondent Fluor is correct in arguing that Complainant's activity of "investigation" fails as a matter of law to constitute a protected activity under the ERA as it does not implicate safety definitively and specifically. *See, e.g., Childers v. Carolina Power & Light,* 1997-ERA-32 (ARB Dec. 29, 2000) (finding complainant's complaint to employer about fairness of performance evaluation not a protected activity under the ERA). *See generally Am. Nuclear Res., Inc. v. U.S. Dep't of Labor,* 134 F.3d 1292, 1295 (6th Cir. 1998); *Kester v. Carolina Power & Light Co.,* 2000-ERA-31 (ARB Sept. 30, 2003).

Initially, as to Complainant's general allegations concerning comments or criticisms of Fluor management regarding safety concerns over nuclear handling procedures, Complainant has alleged a protected activity. *See Bechtel Constr. Co. v. Sec'y of Labor,* 50 F.3d 926 (11th Cir. 1995); *Thomas v. Arizona Pub. Serv. Co.,* 89-ERA-19 (Sec'y Sept. 17, 1993). In addition to establishing a protected activity, however, a complainant must also allege such activity with sufficient specificity. In *Green v. Envtl. Protection Agency,* 2002-SWD-1 (ALJ Feb. 10, 2003), the judge noted that no Department of Labor whistleblower case had as of then discussed the degree of specificity needed to establish jurisdiction. Relying on two Merit Systems Protection Board cases that had addressed the issue of specificity, the judge dismissed the case for failure to allege subject matter jurisdiction on the basis that the complainant before him did not specify the content of disclosures, the person to whom the disclosures were made, and when the disclosures were made. *Id.* at 7.

Here, although Complainant's allegations in his Response and Pre-Hearing Statement lack specificity as to whom criticisms of handling procedures were made and when, the allegations are sufficiently specific regarding the nature of his protected activity and the relationship between this activity and the purpose of the pertinent environmental statute and implementing regulations.[3] Although I note the allegations of various complaints to Fluor management are not entirely explicit, they are specific enough to move from the realm of "vague allegations of wrongdoing regarding broad imprecise matter" to establish at least a *prima facie* allegation of a protected activity and therefore subject matter jurisdiction over his claim. *Id.; see Santamaria v. Envtl. Protection Agency,* 2004-ERA-6 (ALJ Feb. 24, 2004) (finding that complainant failed to establish necessary subject matter jurisdiction due to lack of specificity). Accordingly, Complainant has established through his imperfect but adequate allegations that he engaged in a protected whistleblower activity.

[3] I note that this is the first forum in which Complainant has alleged with any sort of specificity or priority that he made complaints to Fluor management regarding safety procedures. Complainant's July 2001 filing with the DOE SCO consisted of the charge that Complainant had been retaliated against for not buying donuts in contravention of a manager's direction, and possibly for buying a house and the expensive health needs of his daughter. These same charges were repeated at the Fluor Hanford ECP level. It was not until a March 28, 2002 filing with the EEOC against Master-Lee that Complainant mentioned complaints about poor management procedural practices. Complainant charged Fluor with discrimination based on the same reasons following the placement of the stop access and incorporated by reference his previous EEOC filing against Master Lee. This is relevant only to the inquiry as to Complainant's first two elements of the *prima facie* case---protected activity and respondent's knowledge of such---not to whether Complainant established the fourth element, inference of a causal relationship. *See Paynes v. Gulf State Utilities Co.,* 1993-ERA-47, at 6-7 (ARB Aug. 31, 1999).

Awareness of Protected Activity

Assuming without deciding that the stop access order constitutes an adverse action, Complainant has failed to offer any evidence indicating Fluor Hanford had knowledge of any protected activity at the time of the order's issuance. The ARB has held that although knowledge of protected activity can be shown by circumstantial evidence, that evidence must show that an employee of the respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge. *Mosley v. Carolina Power & Light Co.,* 94-ERA-23 (ARB Aug. 23, 1996); *Frady v. Tennessee Valley Auth.,* 92-ERA-19 and 34 (Sec'y Oct. 23, 1995). Here, the undisputed facts indicate that Mr. MacLeod of Fluor Hanford was responsible for the decision to issue the stop access order in December 2001. Mr. Strankman, then serving as Fluor's Manager of Support Services, agreed with Mr. MacLeod's decision. Mr. MacLeod in his deposition stated that he had no knowledge of any complaints Complainant might have made; Mr. Strankman indicated in his deposition that the only information regarding Complainant he had derived from Mr. Phalen, consisting simply of the fact that Complainant was terminated for performance deficiencies.

Moreover, Complainant's charges to both the DOE SCO and Fluor ECP[4] in July-August 2001 fail to state or even raise any issue of a protected activity; rather, Complainant himself had to be informed by the Fluor Hanford coordinator assigned to Complainant's case that "retaliation is an action that has the effect or perceived effect of punishing a person for engaging in legally protected activities-and that a legally protected activity is any action taken by an employee to prevent harm to the environment. This is normally through a safety, health, or environmental issue." CX 94. Complainant was also informed that his issue did not fall under any of these categories. *Id.* From July-August 2001, Complainant never once, in either the SCO or ECP documents, indicated that he was being "retaliated" against because he raised safety concerns.

In addition and perhaps more importantly, the submissions of the parties do not permit any inference that Complainant's alleged protected activities had any bearing on Mr. MacLeod's decision to place Complainant on the stop access list. Rather, Complainant's post-termination conduct---including his investigation into his termination from Master-Lee---precipitated the decision to deny Complainant access to the Fluor Hanford site. Complainant himself, in various letters and in his deposition, stated that he was placed on the list because of his investigation. Complainant stated that after his termination on July 12, 2001, "I conducted my own investigation. Fluor Hanford retaliated against me by placing a stop access on me on December 3, 2001," and in his deposition, Complainant iterated this conclusion, stating that he "tried to ask questions and as a result of asking questions, I ended up getting a stop access on me. I tried to get to the root of what was going on." *Complainant's Deposition* at 38-40.

Complainant makes no attempt to provide any factual evidence that Mr. MacLeod or Mr. Strankman knew, at the time the stop access order issued, of Complainant's alleged internal

[4] For reference, Complainant's July 2001 filing with the DOE SCO consisted of the charge that Complainant had been retaliated against for not buying donuts in contravention of a manager's direction, and possibly for buying a house and the expensive health needs of his daughter. These same charges were repeated at the Fluor Hanford ECP level.

complaints to Fluor management. Further, Complainant's initial DOE SCO and Fluor ECP concerns fail to make any reference to a protected activity, and Complainant's EEOC complaints against Fluor Hanford---assuming any claim of whistleblowing activity could be inferred from them---were filed in 2002, well after the stop access order issued in December 2001.

Based on the foregoing and examining the record in the light most favorable to Complainant and drawing all inferences in his favor, I find that Complainant has failed to establish that a genuine issue of material fact exists with regard to whether Respondent Fluor was aware of Complainant's alleged whistleblowing activities at the time the stop access issued. There is no evidence, either direct or circumstantial, that Fluor was aware of his protected activity while at the Fluor Hanford site. *See Samodurov v. Niagra Mohawk Power Co.,* 89-ERA-20, at 9-10 (Sec'y Nov. 16, 1993). Because no genuine issue of material fact has been established, and Complainant has failed to establish a necessary prong of his *prima facie* case, Respondent Fluor Hanford is entitled to judgment as a matter of law.

Nexus

Even assuming *arguendo* that Complainant had established that Fluor was aware of his protected activities, Complainant must also raise the inference that the protected activity caused the adverse action.[5] *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981) (Title XI II case); *Cohen v. Fred Mayer, Inc.,* 686 F.2d 793 (9th Cir. 1982) (Title VII case); *Larry v. Detroit Edison Co.***,** 86-ERA-32 (Sec'y June 28, 1991). To establish a *prima facie* case, a complainant need produce only enough evidence to raise the inference that the motivation for the adverse action was his protected activity; not to establish motivation. *Pillow v. Bechtel Constr., Inc.***,** 87-ERA-35 (Sec'y July 19, 1993). In making a *prima facie* case, temporal proximity between the protected activities and the adverse action may be sufficient to establish the inference that the protected activity was the likely motivation for the adverse action. *Larry v. Detroit Edison Co.***,** 86-ERA-32 (Sec'y June 28, 1991); *Conaway v. Valvoline Instant Oil Change, Inc.*, 91- SWD-4 (Sec'y Jan. 5, 1993); *Abu-Hjeli v. Potomac Elect. Power Co.***,** 89-WPC-1 (Sec'y Sept. 24, 1993). Complainant alleged that he made complaints in March-April 2001, but because his allegations are not specific enough, I cannot make a determination as to temporal proximity.

I find that Complainant has not carried his "light burden" in raising the inference that his protected activity caused the alleged adverse action of being placed on the stop access list. *See Fritts v. Indiana Michigan Power Co.,* 2001-ERA-33, at 22 (ALJ Mar. 7, 2003) (comparing burden in establishing prima facie case and burden in establishing ultimate liability). First, Complainant's allegation that Fluor Hanford employees "fabricated" false allegations and communicated them to Mr. MacLeod, who then used these allegations to place and maintain the stop access order, fails to raise the necessary inference of animus. Second, as previously discussed *infra,* there is no evidence that Fluor, through Mr. MacLeod, knew of Complainant's safety complaints at the time the stop access issued. Third, despite Complainant's vehement denial that he engaged in any threatening behavior, Complainant does admit conducting his own

[5] I acknowledge that improper motivation must be present to constitute "adverse action," *see Garn v. Toledo Edison Co.,* 88-ERA-21 (Sec'y May 18, 1995), but for purposes of analysis I will assume without deciding that the action of placing Complainant on the denial of site access list was adverse to Complainant.

"investigation" into the reasons for his termination from Master-Lee. This "investigation," in Complainant's own words, consisted of "[c]alling up people and asking them if they knew why my work ended," and included speaking to Ms. Claudette Lang, Mr. Bob Heck, and Ms. Strankman. *Complainant's Deposition* at 72-73. On the basis of Complainant's contact with these and other Fluor employees, Mr. MacLeod issued a denial of site access on Complainant.

Irrespective of the party's perceptions as to Complainant's conduct, the undisputed facts establish that Complainant engaged in post-termination conduct of contacting Fluor management and personnel for a number of months prior to the issuance of the stop access order, and such order was issued on the basis of this conduct. Whether Fluor Hanford, as Complainant alleges, "fabricated claims to damage credibility, defame character" of Complainant, is beyond the jurisdiction of this court to decide, and impedes the inference that Fluor issued a stop access because of his alleged whistleblowing activity. Even if the stop access decision was based, as Complainant seems to assert, on a mistaken conclusion about Complainant's conduct, "a decision violates the Act only if it was motivated by retaliation." *Morgan v. Massachusetts Gen. Hosp.,* 901 F.2d 186, 191 (1st Cir. 1990); *see Jones v. Gerwens,* 874 F.2d 1534, 1540 (11th Cir. 1989); *Jeffries v. Harris County Community Action Ass'n,* 615 F.2d 1025, 1036 (5th Cir. 1980); *Dysert v. Westinghouse Electric Corp.,* 86-ERA-39 (Sec'y Oct. 30, 1991). Here, even viewing the record in a light most favorable to Complainant, there are no genuine issues of material fact as to whether Fluor's concerns in issuing the stop access were connected with the substance of any environmental issues that Complainant may have raised. *See, e.g., Jarvis v. Battelle Pacific NW Laborator,* 97-ERA-15 (ARB Aug. 27, 1998) (applying retaliatory intent analysis, Complainant's one-week suspension result of his abrasive comments and not safety complaints); *Makam v. Pub. Serv. Elec. & Gas Co.,* 1998-ERA-22 (ARB Jan. 30, 2001) ("Whistleblower provisions such as the ERA's […] are not, however, intended to be used by employees to shield themselves from termination actions for non-discriminatory reasons.").

Complainant has not offered sufficient evidence to make a *prima facie* case because the evidence is insufficient to establish the requisite nexus between his protected activity and the adverse action. He cannot establish the requisite nexus because there is no evidence that the persons who made the decision to terminate him knew that he was a whistleblower, or that the decision was made for any other reason than his post-termination conduct.

CONCLUSION

Because Complainant cannot establish that he suffered an adverse employment action on the part of Respondent Master-Lee, and has failed to raise a genuine issue of material fact as to whether Respondent Master-Lee explicitly or implicitly was responsible for the stop access order, I recommend that Respondent Master-Lee's motion for summary decision be granted. Because Complainant did not file a timely whistleblower complaint, summary decision in favor of Respondent Fluor is proper. Alternatively, Complainant has not established that Respondent Fluor knew of his alleged whistleblower status during the time the decision was made to place him on the stop access list, and because there is no inference that the decision was made based on his alleged safety complaints, Complainant cannot establish a *prima facie* case and summary decision in favor of Respondent Fluor Hanford is proper. In sum, because there are no genuine issues of material fact, Complainant has failed to set forth a claim upon which relief may be

granted, and therefore summary decision in favor of Respondents Master Lee and Fluor Hanford is proper. Accordingly, as Complainant cannot prevail in this action, I recommend that Respondents' motions for summary decision be granted and that the complaints in this matter be dismissed.

ORDER

Based on the foregoing, I find and conclude that the following recommended order issue:

1. The motion of Respondent Master-Lee for summary decision is hereby **GRANTED**.

2. The motion of Respondent Fluor-Hanford for summary decision is hereby **GRANTED**.

3. Complainant's complaint in this matter, Case No. 2003-ERA-00025, is hereby **DISMISSED**.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. 24.8 and 24.9, as amended by 63 Fed.Reg. 6614 (1998).

GME/dmr